

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

November 3, 2000 Session

**FREIDA BOYLE v. THE PROCTER & GAMBLE MANUFACTURING
COMPANY**

**Direct Appeal from the Chancery Court for Madison County
No. 54648 Joe C. Morris, Chancellor**

No. W2000-00064-WC-R3-CV - Mailed March 8, 2001; Filed May 3, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer contends the trial court erred in determining that the employee's injury was causally connected to her employment and that the employee complied with statutory notice provision pursuant to Tenn. Code Ann. § 550-6-201. It also contends that the award of 40% permanent partial disability to the body was excessive. As discussed below, the panel concludes that the judgment of the trial court should be affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

C. CREED MCGINLEY, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, JR. SP. J., joined.

Edwin E. Wallis, Jr. and Beth H. DuPree, Jackson, Tennessee, for the Appellant, Proctor & Gamble Manufacturing Company.

David Hardee, Jackson, Tennessee, for the Appellee, Freida Boyle

MEMORANDUM OPINION

The claimant, Freida Boyle, commenced this civil action on April 23, 1998, seeking recovery of benefits under the Tennessee Workers' Compensation law for an injury she alleged occurred on January 6, 1998. After a trial on the merits, the Chancellor found that the employee's herniated disc and resulting disability were causally related to the January 6, 1998, accident. The Chancellor also found the short delay in giving notice was reasonably excused and therefore in compliance with Tenn. Code Ann. § 50-6-201. Finding compensability, the Chancellor awarded Ms. Boyle 40% permanent partial disability to the body as a whole.

Our review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires this tribunal to examine in depth a trial court's factual findings and conclusions. The reviewing court is not bound by a trial court's factual findings but instead conducts an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d. 584 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review, because it is the trial court which had the opportunity to observe the witness's demeanor and to hear the in-court testimony. Long v Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of depositional testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

At the time of trial Ms. Boyle was 33 years of age. Her educational background consisted of high school and one year of business college, from which she obtained a medical office assistant degree. Her vocational history is unremarkable, consisting of limited use of this business college degree followed by return to unskilled factory labor.

Ms. Boyle testified that she was working for her employer when she injured her back on January 6, 1998, while opening a lid on a rail car with a pipe wrench. She testified that the lid was difficult to open and required a lot of pulling and tugging and that when she stood up she felt a “catch” in her back and experienced pain. She was alone when the accident occurred. She sought non-prescription pain medication which she received and continued to work the remainder of that week. She testified that her pain continued to worsen for which she sought medical treatment for a back strain. A CAT scan was performed on January 28, 1998, which revealed a herniated disc. Surgery was performed by Dr. Joseph Perry Rowland on February 9, 1998. Following surgery, the employee attempted to return to work but was ultimately terminated by the employer on January 15, 1999, because of absenteeism.

After considering the lay testimony in this case as well as the testimony of Dr. Rowland and Dr. Robert J. Barnett, the Chancellor determined the accident of January 6, 1998, was the origin of the back injury that ultimately led to Ms. Boyle’s surgery and disability. The plaintiff had given poor history to her medical providers. Prior to her surgery she had never related to a medical provider that her injury was work related. Ms. Boyle testified to a prior history of back strains and initially was diagnosed with a back strain in this case. She testified she did not want to report a strain as work related and it was only after her surgery she reported her injury was, in fact, related to the January 6, 1998, lifting incident. The trial court had the opportunity to see and evaluate the witness’s demeanor during her testimony. This panel is not in a position to second guess the trial court on issues of credibility. The Chancellor found her to be a credible witness and further found her testimony had satisfactorily resolved any inconsistencies in her favor.

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. The court has consistently held that an award may properly be based upon medical testimony to the effect that a given incident “could be” the cause of the employee’s injury when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Resser v Yellow Freight Sys., Inc. 938 S.W.2d 690, 692 (Tenn. 1997). Obviously, the Chancellor found the plaintiff’s testimony to be persuasive and when coupled with the medical proof offered by Dr. Rowland, as well as Dr. Robert J. Barnett, found that causation had been established. Affording the Chancellor the statutory presumption of correctness, this panel does not find that the presumption of evidence is otherwise.

The appellant contends in its second issue that the worker failed to sufficiently comply with the statutory notice provision contained in Tenn. Code Ann. § 50-6-201, which provides in part:

Every injured employee or such injured employee’s representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has not actual notice, written notice, of the injury . . . and no compensation shall be payable under the provisions of this Chapter unless such written notice is given to the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the Tribunal to which the claim for compensation may be presented. (emphasis ours)

The Chancellor made detailed findings of fact concerning notice in this case. The Chancellor found that the employer’s representatives had notice no later than February 17, 1998, which is only slightly outside the thirty (30) day statutory period. The Chancellor found that the employee had only discovered the nature and extent of her back injury on January 30, 1998, when she was diagnosed with a herniated disc. The Chancellor further found that according to the plaintiff’s testimony, which he found credible, she felt that she only had a “catch” in her back, and had she known the nature and extent of her injury would have reported it sooner. The Chancellor specifically found based upon the testimony presented at this trial that Ms. Boyle’s short delay in giving notice was reasonably excused. In reviewing the record, this panel can not say that the preponderance of the evidence is otherwise. The Chancellor further found the appellant, Procter & Gamble, had suffered no prejudice by short delay in the giving of notice.

In the appellant’s last issue, it claims the evidence preponderates against the Chancellor’s finding of 40% vocational disability to the body as a whole. The Chancellor found Ms. Boyle did not have a meaningful return to work, therefore the statutory caps of 2 ½ times the anatomical impairment provided in Tenn. Code Ann. § 50-6-241 would not apply. Her anatomical rating assigned by her treating physician, Dr. Rowland, was 10% to the body as a whole using the AMA

guidelines. Ms. Boyle's evaluating physician, Dr. Robert J. Barnett, assessed her anatomical disability as 20% to the body as a whole using orthopedic guidelines. The use of either of these guidelines is authorized by Tenn. Code Ann. § 50-6-204. The record demonstrates the Chancellor used appropriate statutory criteria in determining the plaintiff's vocational disability and that his finding of a vocational disability of 40% is clearly supported by a preponderance of the evidence.

After full review of this record, this panel concludes that the preponderance of the evidence is not contrary to the Chancellor's decision, thus the award of the trial court is affirmed. Costs on appeal are taxed to the appellant, The Proctor and Gamble Manufacturing Company.

C. CREED MCGINLEY, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Procter and Gamble Manufacturing Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM